IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1976

NO. **76-200**

TEXAS EDUCATION AGENCY
(Austin Independent School District), et al,
Petitioner

V.

UNITED STATES OF AMERICA, et al,
Respondents
MEXICAN-AMERICAN LEGAL DEFENSE & EDUCATIONAL FUND, et al,
Intervenors-Respondents
DEDRA ESTELL OVERTON, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al,
Intervenors-Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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LIST OF AUTHORITIES

CASES

UNITED STATES STATUTES

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The Austin Independent School District petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 532 F.2d 380 and is reproduced in the Appendix at 1. The order overruling Petitioner's Petition for Rehearing En Banc was entered on June 9, 1976, without opinion. The Memorandum Opinion and Order of the United States District Court for the Western District of Texas, Austin Division, entered on August 1, 1973, is unreported, and is reproduced in the Appendix at 44.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). This petition for certiorari is presented within 90 days of the date of the judgment of the Fifth Circuit.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that school districts are constitutionally prohibited from using neighborhood school assignment if the school districts contain ethnically concentrated residential areas, even though the use of neighborhood assignment is for non-discriminatory, educational reasons?

2. May a Court require a remedy involving extensive further transportation of younger elementary school children to obtain greater desegregation despite District

Court findings, not held to be clearly erroneous, of adverse consequences to the children's health, safety, and education that would be caused by the increased transportation?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved in this case and are set forth in the Appendix: (a) Fourteenth Amendment to the United States Constitution; (b) 20 U.S.C. §§1701; 1702(a)(4) and (5); 1704; 1705 and 1707; and (c) 42 U.S.C. §2000c-6(a) and (b).

STATEMENT OF THE CASE

A. *Description of the School District and its Policies*

The Austin community is a tri-ethnic community and has been for many years. It has effective tri-ethnic representation on the governing boards of its school district and city government. Unlike integration in many northern and southern cities, school integration in Austin has gone smoothly. Austin commenced efforts to comply with *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*) almost immediately after this Court rendered its opinion.[1]

[1]On August 8, 1955, while most of the country continued to respond to *Brown II* by doing nothing, the School District adopted a plan to

The Austin Independent School District (hereafter "School District") encompasses the City of Austin, Texas, and adjoining areas outside the city. During the 1975 school year, the School District had approximately 59,000 students and 79 schools. The School District educates approximately 15 percent black, 23 percent Mexican-American and 62 percent "Anglo" (non Mexican-American whites) students. The City of Austin is bisected north and south by a major expressway (Interstate 35) and east and west by the Colorado River. The few bridges crossing the river are located near the center of the city. Along the west side of Interstate 35 and in the center of the city are the downtown area, the state offices complex, and the University of Texas. Few major east-west streets cross this area. As in other urban areas with significant ethnic populations, Austin's ethnic groups have tended to concentrate their residences in particular sections of the city. Generally, most blacks have resided in the area east of Interstate 35, near the center of the city. Most Mexican-Americans have resided south of that area, and Anglos have resided in west, south and north Austin. The areas of black and Mexican-American concentrations have expanded and shifted over the years.

Until the start of court ordered desegregation, no extensive bus transportation system was used by the School District. The School District has used a neighborhood assignment policy throughout its history, except as to

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desegregate the school system beginning with the high school level. The plan worked well enough that in 1963, integration was extended to the entire District at one time. During the Sixties, the Department of Health, Education and Welfare by numerous letters certified that the School District was in compliance with the Civil Rights Act of 1964.

black students during the time state statutes required separate facilities. During that period, Mexican-Americans were always treated as white for the purposes of statutory segregation. No statute, School Board regulation or policy ever required segregation of Mexican-Americans, and in fact, Anglos and Mexican-Americans have attended school together virtually at all times.

B. *Procedural History*

On August 7, 1970, the United States filed suit, pursuant to 42 U.S.C. §2000c-6(a) and (b), against the School District (and other school districts) alleging segregation of Mexican-Americans and alleging that prior segregation of blacks had not been fully remedied. A trial was conducted thereafter, and the Court on June 28, 1971, issued a Memorandum Opinion and Order in which it found no *de jure* segregation of Mexican-Americans, but that some all-black schools survived as vestiges of the prior dual system. App. 74. On July 19, 1971, the Court entered an order for the implementation of a plan to remedy these remaining vestiges. App 58.

The United States appealed these orders to the Fifth Circuit, and certain individuals represented by the National Association For The Advancement Of Colored People (NAACP) and by Mexican-American Legal Defense & Educational Fund (MALDEF) were allowed to intervene in the appeal. The Fifth Circuit considered the appeal *en banc*, with 14 judges participating. On August 2, 1972, the Court issued seven opinions. 467 F.2d 848-891 (*Austin I*). One-half of the judges did not reach the merits because of the pendency of *Keyes v. School Dis-*

trict No. 1, 413 U.S. 189 (1973), (then undecided), but because the Court was evenly divided, they joined with an eighth judge in voting to remand the case to the District Court without deciding the merits of the Mexican-American issue. *See* Judge Godbolds' opinion, 467 F.2d 889, and Judge Bell's majority opinion, 467 F.2d 883. The other six judges would have reversed the District Court on both the Mexican-American issue and the remedy issue. *See*, Judge Wisdom's opinion, 467 F.2d 852.

C. *The District Court's Opinion*

On remand, the District Court heard 12 days of new evidence and reconsidered the evidence from the prior trial. After the trial was concluded, but before a decision was reached, this Court rendered its decision in *Keyes*. On the basis of its reading of *Keyes,* the District Court held that the School District, because of past *de jure* segregation of blacks, had the burden of showing that there had been no *de jure* segregation of Mexican-Americans. The Court then held that the School District had sustained this burden. App. 50. On the issue of alleged segregation of Mexican-American students, the District Court noted that one senior high school, two junior high schools, and eight elementary schools in Austin educate disproportionate numbers of Mexican-Americans. This statistical imbalance was found not to result from any statute, rule, regulation or policy of the School District prohibiting Mexican-American students from attending schools with Anglos, and not to be in any way related to the maintenance of the previous statutorily mandated black-white dual school systems. While during the first half of this century the School District had provided three special schools

to serve the educational needs of non-English speaking students and the children of migrants, the Court noted there was no requirement that Mexican-Americans attend these schools. The Court found that the existence of these schools represented no more than a "humane and compassionate" attempt to meet the special educational needs of children who would otherwise have been much more severely handicapped in their efforts to obtain an education.

Searching further for the causes of the racial imbalance, the Court noted that five of the now predominantly Mexican-American schools had originally opened with a majority of Anglo students but because of shifting residential patterns, had become schools with concentrated Mexican-American student populations. Those schools which had opened with Mexican-American majorities were located in response to growth in the area, but because of natural physical barriers tending to isolate East Austin could not readily serve other areas outside or adjacent to it. The Court found that in no area of its responsibilities had the School District ever acted with segregative purpose or intent toward Mexican-American students.

The Court's task of fashioning a remedy to eliminate any remaining vestiges of the statutory segregation of blacks was made easier because of the already complete integration of grades seven through twelve, primarily by busing, and a substantial number of integrated elementary schools. The Court found that the sixth grade could be integrated through the establishment of sixth grade center schools, but that additional integration of lower grades would involve "progressively massive transportation, the

uprooting of children in their earliest formative years, and would be educationally dysfunctional." The Court further found that "the time required for transportation, risk to health, and probable impingement of education of students younger than the sixth grade would be prohibitive under any such plan." App. 53. After considering all aspects of the situation, the Court ordered the adoption of the Sixth Grade Center Plan and held that, combined with the previous plans and other steps ordered by the Court, Austin would have achieved the greatest degree of desegregation possible, taking into account the practicalities of the situation.

D. *The Court of Appeals' Opinion*

The United States and the Intervenors appealed. Judge Wisdom, the author of a minority opinion in 1972, wrote for the panel, reversing the District Court's holding that there had been no *de jure* segregation of Mexican-Americans by the School District. The Court "conformed" its prior opinions to this Court's holding in *Keyes* and "inferred" that the School District intended to segregate Mexican-American students by its use of neighborhood schools. The Court made no determination that the District Court's findings of fact were "clearly erroneous," as is required for reversal by Rule 52 of the Federal Rules of Civil Procedure, but, instead, adopted a legal theory—that neighborhood school assignment in areas of Mexican-American residential concentration is in itself unconstitutional—that made the District Court's factual findings irrelevant. The Court held that "school authorities may not constitutionally use a neighborhood assignment policy creating segregated schools in a district with ethnically segregated residential patterns." App. 20.

Shifting its attention to the remedy issue, the Court held that the plan approved by the District Court was inadequate because it did not require mixing of all blacks and Mexican-American students with Anglos. After a cursory review of the School District's objections to the so-called "Plan" put together by an expert for the Intervenors, the Court dismissed the School District's objections saying that they were either inconsequential or could be remedied on remand. The Court concluded by ordering the District Court to draft a comprehensive tri-ethnic desegregation plan that conforms to one of the approaches outlined by the Intervenors' expert. The case was reversed and remanded to the District Court.

REASONS FOR GRANTING THE WRIT

I.

THE FINDING OF *DE JURE* SEGREGATION BASED ON THE ETHNIC IMBALANCE CAUSED BY NEIGHBORHOOD SCHOOLS.

The question presented by this case is, quite simply, the constitutionality of the use of neighborhood school assignment—assignment of students to the school of their level closest or most convenient to their homes—in areas of racial or ethnic residential concentration where racially or ethnically imbalanced schools result. Because racial or ethnic residential concentration exists in almost all urban and many non-urban areas and because the many advantages of neighborhood school assignment have made its use nearly universal, this question is undoubtedly the most important question in school desegregation litigation

today, and it may well be the most troubling question facing the country. The holding of the Court of Appeals for the Fifth Circuit that the use of an ethnically neutral policy of neighborhood assignment in areas of Mexican-American concentration establishes *per se* unconstitutional or *de jure* segregation requiring a remedy is in direct conflict with the decisions of other Courts of Appeals and in accordance with the decisions of still others. Finally, it is in conflict with the Congressional declaration of policy in the Equal Educational Opportunity Act of 1974 that "the neighborhood is the appropriate basis for determining public school assignments." The consequences of the Fifth Circuit's decision, if allowed to stand by this Court, are likely to be extremely harmful to the goal of quality integrated education in Austin, Texas. We submit, therefore, that grant of this petition to review the decision of the Fifth Circuit is strongly supported by every relevant consideration set out by this Court in Rule 19.

There can be no doubt as to the basis on which the Fifth Circuit reversed the District Court's holding that Mexican-American students had not been unconstitutionally segregated by the School District. Without showing or expressly holding that the District Court's factual findings on this issue are clearly erroneous, the Fifth Circuit adopted a legal standard for finding unconstitutional segregation that effectively made those findings irrelevant and made the mere fact of ethnic imbalance itself unconstitutional. The Fifth Circuit found a *prima facie* case of unconstitutional segregation of Mexican-Americans by the School District as follows:

> It has been the AISD's policy to assign students to the schools closest to their homes. The City of Austin, with the exception of the strip between East and West Austin, has ethnically segregated housing patterns. Hence, the natural, foreseeable, and inevitable result of the AISD's student assignment policy has been segregated schools throughout most of the City. Moreover, as we found in *Austin I*, '[a]ffirmative action to the contrary would have resulted in desegregation . . .' The inference is inescapable: The AISD has intended, by its continued use of the neighborhood assignment policy, to maintain segregated schools in East and West Austin. [citation and footnotes omitted]

App. 16.

The Fifth Circuit's holding that the School District failed to rebut the *prima facie* case is contained in the following quotation:

> At least in the Texas schools, where we have held that Mexican-American students are entitled to the same benefits of *Brown* as are blacks, school authorities may not constitutionally use a neighborhood assignment policy creating segregated schools in a district with ethnically segregated residential patterns. A segregated school system is the foreseeable and inevitable result of such an assignment policy. When this policy is used, we may infer that the school authorities have acted with segregative intent.

App. 20.

Although this rule is phrased in terms of "Texas schools" and "Mexican-American students," it is clearly applicable to any racial or ethnic minority in any state. Once the rhetoric of "inferred intent" and "natural and foreseeable consequences" is pierced, it is obvious that a *per se* rule of unconstitutionality has been created. In this country, the universally accepted basis of assignment to schools has been the neighborhood. Hence, regardless of actual purpose or intent, a *prima facie* case of *de jure*

segregation may be made out under the Fifth Circuit's holding when neighborhood schools are used in school districts with racial or ethnic concentrations.

The Fifth Circuit has in effect adopted the legal standard for finding unconstitutional segregation that was proposed by a minority of six judges, in an opinion also by Judge Wisdom, in *Austin I*. In his *Austin I* opinion Judge Wisdom expressly adopted the view that "It is not necessary to prove discriminatory motive, purpose or intent as a prerequisite to establishing an equal protection violation where discriminatory effect is present." 467. F.2d at 864-65 n. 25.[2] The effect of this approach would be, of course, to eliminate the distinction between constitutionally prohibited *de jure* segregation and statistical racial imbalance and to find in all racial imbalance a constitutional violation requiring remedy.[3]

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[2]*See also*, Judge Wisdom's statement in his *Austin I* opinion that:

> The statistics in this case, as in almost all school cases, prove a pattern of discrimination. The statistics supplemented by maps in evidence graphically show a heavy concentration of students of one race in a school in an area where there is a heavy concentration of residents of that race.

467 F.2d at 873. But, see, to the contrary, Mr. Justice White's statement for this Court in *Washington v. Davis*, __ U.S. __, 96 S.Ct. 2040, 2048 (1976) that this Court has "rejected allegations of racial discrimination based solely on the statistically disproportionate racial impact" of racially neutral legal requirements.

[3]It was on the basis of this legal standard that Judge Wisdom would have reversed the District Court and found unconstitutional segregation of Mexican-Americans in *Austin I*. Contrary to statements in the present opinion of the Fifth Circuit, however, this legal standard was adopted by only a minority of the judges of the Fifth Circuit who participated in *Austin I*. Under the majority opinion, as Judge Wisdom protested in his dissenting opinion, "The validity of the *de facto-de jure* dichotomy remains unanswered." 467 F.2d at 887.

The present opinion of the Fifth Circuit purports to recognize that the legal standard for finding unconstitutional segregation adopted in Judge Wisdom's opinion in *Austin I* (incorrectly identified as the opinion of the Court) is invalid: "To the extent that . . . *Austin I* applied cause-and-effect tests and rejected the requirement of a showing of discriminatory intent, [it was] supervened by *Keyes*." App. 10. As the reasoning of the Fifth Circuit quoted above shows, however, in effect the very same invalid standard was adopted and applied in the present opinion. What the Fifth Circuit has done is to acknowledge on the one hand that this Court in *Keyes* "supervened," or more accurately overruled, the Fifth Circuit's holding in prior cases that *de facto* segregation is unconstitutional and then, on the other hand, to reinstitute the unconstitutionality of *de facto* segregation by establishing a rule that makes racial or ethnic imbalance in schools unconstitutional.

That the Fifth Circuit has rejected the relevance of a showing of discriminatory intent to a finding of *de jure* segregation is apparent throughout its opinion. The opinion states, for example, that unlawful state-imposed segregation may be established by showing that "affirmative action by school authorities could have resulted in desegregation." App. 13. Similarly, the opinion denounces as a "basic misconception" the School District's argument that it has no constitutional duty to eliminate school ethnic concentration resulting from residential ethnic concentration and not from ethnic discrimination. Of course, school ethnic concentration or imbalance can always and everywhere be eliminated by abandoning neighborhood assignment and adopting ethnic assignment and the trans-

portation of children out of their neighborhoods. The assignment pattern is always controlled by the School District. The adoption and continued use of neighborhood assignment provides no basis for finding or inferring discriminatory intent on the basis of foreseeable consequences, however, because its use is explained and justified by compelling reasons that have nothing to do with discrimination. The logic that might underlie the foreseeable consequences test in other areas breaks down when applied to the use of a neighborhood school assignment policy because several results are natural and foreseeable. Recognizing that in metropolitan areas usually there are ethnically and racially concentrated housing patterns, one foreseeable consequence of the neighborhood school student assignment policy is ethnically concentrated schools. Other equally foreseeable consequences of the neighborhood school are "minimization of safety hazards to children in reaching school, economy of cost in reducing transportation needs, ease of pupil placement and administration through the use of neutral, easily identifiable standards, and better home-school communication." *Keyes*, 413 U.S. at 245-246 (concurring opinion Mr. Justice Powell). In addition, Justice Powell points out that the basic reason for neighborhood schools is the "deeply-felt desire of students for a sense of community in their public education . . . [C]ommunity support, interest, and dedication to public schools may well run higher with the neighborhood attendance pattern: distance may encourage disinterest." *Id*. Consequently, more than one logical inference is possible when a school board continues to use a neighborhood policy. To find *de jure* segregation on the basis of a school district's continued use of neighborhood assignment is, therefore, not to find but to obviate the need for finding discriminatory intent and to make neighborhood assignment unconstitutional almost everywhere despite the fact that its use provides no basis for inferring discriminatory intent.

The Fifth Circuit can derive no support for its decision by its references to the *en banc* decisions of the Court in *Austin I*. These references on this issue are all to Judge Wisdom's minority opinion which was based, as the Fifth Circuit now purports to recognize, on an erroneous legal standard. For example, in *Austin I* Judge Wisdom, referring to the schools that served the special needs of some Mexican-American children (the non-English speaking children of migrant workers), stated:

> We admire the AISD for its unquestionably sincere efforts in this area. Yet, we are not convinced that, to meet the special educational needs of Mexican-American children, the AISD had to keep these children in separate schools, isolate them in Mexican-American neighborhoods, or prevent them from sharing in the educational, social, and psychological benefits of an integrated education. [citation omitted] A benign motive will not excuse the discriminatory effects of the School Board's actions.

467 F.2d at 871. In his present opinion for the Fifth Circuit, he quotes only the second sentence of this statement, omitting the first and the third, and then states, "We concluded [in *Austin I*] that the AISD intentionally acted to segregate Mexican-Americans in the pre-*Brown* years." In fact, however, this was not the conclusion of the Court but of only a minority of the participating judges, and that conclusion, as the omitted sentences make clear, was not that the School District intentionally discriminated against

Mexican-Americans but that motive or intent was irrelevant. In any event, the decision in *Austin I* clearly was not and could not be addressed to the proceedings here involved. The decision in *Austin I* was to remand the case to the District Judge for further hearings and consideration specifically instructing him that his power to order a remedy "will depend first upon a finding of the proscribed discrimination in the school system." (467 F.2d at 884). The District Judge then held twelve days of additional hearings and again found no *de jure* segregation of Mexican-Americans. The Fifth Circuit in *Austin I* clearly could not have rejected as "clearly erroneous" findings that had not yet been made. The present opinion, as already noted, in fact holds those findings not clearly erroneous but irrelevant.

The Fifth Circuit's holdings that ethnically neutral neighborhood assignment may not constitutionally be used in areas of ethnic residential concentration—that the resulting ethnically imbalanced schools are *de jure* segregated regardless of the absence of discriminatory purpose or intent—is plainly inconsistent with this Court's school desegregation decisions and reflects a total misunderstanding of the basis of those decisions.

Brown v. Board of Education, 347 U.S. 483 (1954), held that state-compelled school segregation is unconstitutional. In *Green v. County School Board,* 391 U.S. 430, 437-438 (1968) school boards were charged with the duty to eliminate racial discrimination and all its effects from school systems; to see, as this Court stated, "that state-imposed segregation has been completely removed." *Id.* at 439. The duty is not, as the Fifth Circuit apparently believed, to remove, remedy, or prevent racial imbalance in schools not caused by racial discrimination. Three years

after *Green,* this Court reiterated, in *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15 (1971) that "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation." School authorities, the Court said, could decide that "each school should have a prescribed ratio of negro to white students reflecting the proportion for the district as a whole," but "absent a finding of a constitutional violation, . . . that would not be within the authority of a federal court. As with any equity case, the nature of the violation determines the scope of the remedy." *Id.* at 16. This Court further stated that if the holding of the District Court were read "to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse." *Id.* at 24.

In *Keyes,* 413 U.S. at 208, on which the Fifth Circuit purported to rely, this Court "emphasize[d] that the differentiating factor between *de jure* segregation," which requires and justifies a remedy, "and so-called *de facto* segregation," which does not, "is *purpose* or *intent* to segregate." In *Wright v. Council of City of Emporia,* 407 U.S. 451, 473 (1972), Chief Justice Burger stated for himself and three other members of the Court in a dissenting opinion (but with no member of the Court expressing disagreement on this point), "It can no more be said that racial balance is the norm to be sought, than it can be said that mere racial imbalance was the condition requiring a judicial remedy."

This Court's decision in *Milliken v. Bradley,* 418 U.S. 717 (1974), unfortunately ignored by the Fifth Circuit except for citation in a footnote, is squarely in point. In that case this Court held that the existence of predominately

black schools in one school district and predominately white schools in adjacent districts did not, absent a showing that the imbalance was caused by racial discrimination, create an obligation to remove the imbalance. Racially neutral geographic assignment, the decision makes clear, is not constitutionally prohibited merely because racially imbalanced schools result. The desegregation remedy, the Court pointed out, "is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position that they would have occupied in the absence of such conduct." *Id.* at 746. Where, as in the present case in regard to Mexican-Americans, no discriminatory conduct has been found, there is no basis for requiring a remedy.

Two decisions of this Court rendered after the decision of the Fifth Circuit below further demonstrate the fundamental error of that Court's approach. *Washington v. Davis*, __US.__, 96 S.Ct. 2040 (1976), involved a challenge to the use of a qualifying test for applicants for police officer positions in the District of Columbia. Plaintiffs claimed that the test should be held racially discriminatory because it operated to exclude a greater proportion of blacks than whites. Upholding the use of the test despite this undeniable effect, Justice White stated for the Court, "But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." *Id.* at 2047. Regarding the standard in school cases, the opinion in *Washington* concluded:

> The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominately black and predominately white schools in a community is not alone violation of the Equal Protection Clause.

Id. at 2048.

Finally, there is this Court's most recent decision in a school desegregation case. *Pasadena City Board of Education v. Spangler*, 44 U.S.L.W. 5114 (June 28, 1976). Pasadena had been found to have once had an unconstitutionally segregated school system. The segregation had been remedied by implementation of a court-ordered assignment plan which made all the schools in the system majority white. Although the school board did not thereafter change its method of pupil assignment, majority black schools again appeared as the result of population movements. Reversing the lower court, this Court held that the mere existence of racially imbalanced schools, resulting from residential racial concentration, did not establish a constitutional violation and did not require or justify continued steps by the District Court to remove the racial imbalance.

The conflict between the Fifth Circuit's "foreseeable consequences" test and this Court's standard is best illustrated by applying the syllogistic formulation used by the lower court in determining the presence of "inferred intent" to discriminate to the facts in *Washington*. The constitutional violation found here was based on this syllogism: (1) it has been the School District's policy to assign students to the school closest to their homes; (2) the City of Austin generally has ethnically segregated housing patterns; (3) the "natural, foreseeable and inevitable result" has been segregated schools; (4) the School District could have desegrated by abandonment of its policy of assignment of children to the schools nearest to their homes; (5) the School District nevertheless continued to assign children to the school nearest their homes; (6) hence, the inference is inescapable, the reason [purpose or

motive] the School District chose to assign children to the schools nearest their homes was to segregate Mexican-American children. App. 16. The same syllogistic approach applied to *Washington* would result as follows: (1) it has been the police department's policy to give a qualifying test to job applicants; (2) blacks have generally faired worse on that test than whites; (3) the natural and foreseeable result of continued employment of the test has been disqualification of more blacks than whites; (4) the department could have abandoned the test; (5) the department nevertheless continued to use the test; (6) hence, the inference is inescapable, the reason [purpose or motive] the department chose to continue to use the test was to discriminate against blacks. This Court rejected such reasoning in *Washington* because it renders meaningless the constitutional standard requiring a finding of "purpose or intent" to discriminate.

Additional support for the neighborhood assignment policy is found in the Congressional determination embodied in the Equal Educational Opportunity Act of 1974. There Congress found that the neighborhood is the appropriate basis for determining public school assignments, as a matter of national policy. 20 U.S.C. §1701. It further found that the occurrence of racially imbalanced schools caused by population shifts is not an equal protection violation, 20 U.S.C. §1707, and that assignment on a neighborhood basis is not a denial of equal protection of the laws. 20 U.S.C. §1705. The holding of the Fifth Circuit would nullify this Congressional declaration of national policy and render compliance with it a violation of the Fourteenth Amendment.

The substantial conflict among the circuits on the meaning of the "purpose or intent to segregate" standard of *Keyes*, presents another reason to grant the writ. In *Hart v. Community School Board of Education*, 512 F.2d 37

(2nd Cir. 1975), the District Court had found that school authorities had not acted with segregative design or intent. The Second Circuit believed that this Court in *Keyes* had not "settled authoritatively" the question of whether a *de jure* segregation could be based upon foreseeable consequences or whether a finding of racial motivation was necessary. Relying on *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972), the Court held that a finding of racial motivation was not necessary and consequently deemed irrelevant the District Court's finding. The Sixth Circuit similarly held in *Berry v. School District of the City of Benton Harbor*, 505 F.2d 238, 243 (6th Cir. 1974), that "it is not necessary to prove discriminatory motives, purpose or intent as a prerequisite to establishing an equal protection violation when discriminatory effect has been demonstrated," also citing *Wright*. Similarly, in *Oliver v. Michigan State Board of Education*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) and in *United States v. Omaha*, 521 U.S. F.2ds 530 (8th Cir.), *cert. denied*, __ U.S. __, 96 S.Ct. 361 (1975), the Sixth and Eighth Circuits respectively made similar holdings.

Three decisions of the Ninth Circuit and a decision by another panel of the Sixth Circuit conflict with the above cases. The Ninth Circuit reads *Keyes* to require, as a prerequisite to a determination of constitutional violation, a finding that school authorities have intentionally discriminated against minority students by practicing a deliberate policy of racial segregation. *Soria v. Oxnard School District*, 488 F.2d 579 (9th Cir. 1973), *cert. denied*, 415 U.S. 951 (1974); *Johnson v. San Francisco Unified School District*, 500 F.2d 349 (9th Cir. 1974); *Berkelman v. San Francisco Unified School District*, 501 F.2d 1264 (9th Cir. 1974). In *Soria* and *Johnson*, the District Courts had de-

termined that motivation was irrelevant; the Ninth Circuit declared this to be erroneous and held that discriminatory motivation was the critical inquiry. In *Higgins v. City of Grand Rapids*, 508 F.2d 779 (6th Cir. 1974), another panel of the Sixth Circuit held that when no racially discriminatory motivation is shown, statistical imbalance alone does not establish a constitutional violation; there must be a finding of purposeful segregation of students.

The conflict among the circuits on this important question is clear. Significantly, this Court in *Washington*, expressly disapproved the dicta in *Wright* and *Palmer v. Thompson*, 403 U.S. 217 (1971), which had indicated that it was the operative effect of a law and not legislative purpose or motivation that was the paramount factor in determining equal protection issues. As pointed out above, each of the other Circuit Court decisions relied upon by the Fifth Circuit in disregarding inquiry into racially discriminatory motivation, in turn, relied upon *Wright* and *Palmer*.

This Court's opinion in *Washington* removes any doubt that the Fifth Circuit has departed from the standard established by this Court for determining unconstitutional discrimination. Although the Fifth Circuit's test may have some simplistic appeal, it is clear that the Fifth Circuit's test does away with the need for proof of discriminatory purpose and substitutes a test that is based solely upon racially or ethically disproportionate impact. This "effect", standing alone, cannot support a holding of constitutional violation. This Court should correct the legal standard used by the Fifth Circuit and repudiate the *per se* rule holding neighborhood schools unconstitutional in districts having ethnic or racial concentrations.

II.

THE PRACTICAL LIMITATIONS ON DESEGREGATION REMEDIES

Beginning with *Brown II*, this Court has recognized that the district courts, located close to and familiar with the local conditions and practicalities in a school district, should have broad and practical flexibility in performing the judicial appraisal necessary to shape a desegregation remedy. This Court has spoken extensively concerning the shaping of a remedy in both *Swann* and *Davis v. Board of Commissioners of Mobile County*, 402 U.S. 33 (1971), recognizing that "the constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school district as a whole." (*Swann* at 24), and that "having once found a violation, the District Judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." (*Davis* at 37.) Therefore, while the overriding judicial goal is development of a decree "that promises realistically to work and promises realistically to work *now*," (*Green* at 430), the practicalities of the situation and a balancing of interests provide limits to remedial plans.

The majority in *Austin I* referred to these principles in attempting to guide the District Court in shaping a remedy on remand. The District Judge was particularly cautioned that "the length and time of travel for students under any plan must be considered in the light of the age of the children, and the risk to health and probable impingement on the educational process." 467 F.2d at 885.

With these guidelines in mind, the District Court conducted an extensive hearing for the purpose of determining the greatest degree of desegregation possible, taking into account the practicalities of the situation.

Because it found no discrimination against Mexican-American students, the District Court was presented with a situation where the junior and senior high schools were fully desegregated. Additional elementary school integration could be accomplished by removing the sixth grade from elementary schools under a sixth grade center concept whereby six separate schools and two junior high schools located throughout the District would be used for sixth graders. The time and distance involved in transportation to the sixth grade centers was found to be feasible and practical considering the age of the students, and this plan was adopted. Futher integration of elementary schools presented an insurmountable problem, however. There are naturally desegregated elementary schools throughout substantially all the center of Austin. The eight (out of 59) elementary schools with predominately black student populations are located in the eastern portion of the District. Further desegregation of the East Austin elementary schools by use of the close-by Northeast Austin schools was found to be impractical because this would "upset the natural patterns of integration [in Northeast Austin] and would very likely result ultimately in total resegregation." App. 52. Use of the Southeast Austin schools with substantial concentrations of Mexican-American students was found to "be intolerable" because this would force the Mexican-American students to carry a disproportionate share of the burden of desegregation. Use of schools in West and Northwest Austin

was found to require extensive travel time because of the distances involved and because of the fact that buses would have to cross Interstate 35 and skirt or penetrate the downtown area, the State Capitol complex, and the university complex, an area without adequate crosstown access.

Therefore, acting pursuant to the majority opinion in *Austin I* and the directives of this Court, the District Judge examined the practicalities of the situation and found that further desegregation of the eight black elementary schools, "would involve progressively massive transportation, the uprooting of children in the earliest formative years, and would be educationally dysfunctional." Following the Fifth Circuit's direction to consider "age of the children, risk to health and probable impingement on the educational process," he concluded that "the time required for transportation, risk to health and probable impingement of education for students younger than sixth grade would be prohibitive under any such plan." App. 53.

Considering these practicalities, the District Court adopted the School District's proposed desegregation plan and also imposed other extensive requirements on the School District in connection with the plan: a commitment to employ black and Mexican-American assistant superintendents, establishment of majority-to-minority transfer provisions with free transportation, employment of elementary assistant directors to assist in desegregation and education programs directed toward the elementary level, implementation of innovative programs designed to aid minority students including bilingual-bicultural education programs, alteration of existing school attendance zones and the drawing of attendance zones for new

schools to promote desegregation, and construction of new schools in such a manner as to maximize integration. At the time of the 1973 hearing on remand, the School District had, and for years had had, fully desegregated faculty, staff, support personnel, transportation, extracurricular activities and facilities. In addition, the School District had furthered integration by such actions as the gerrymandering of school attendance zones, extending those zones as far as feasibility limits of transportation of students would permit, planning and constructing new schools to draw from naturally integrated neighborhoods where possible, and the closing and combining of schools. The findings of the District Court in regard to the remedy were based in part on the extensive uncontradicted evidence presented by the School District concerning the problems that would be involved in the massive transportation necessary to create greater integration of the eight predominantly black elementary schools. In addition, evidence on the same points was considered from the original 1971 hearing. The record, therefore, abundantly supports the holding of the District Court.

Ignoring this obviously detailed balancing of interests by a District Judge who had been immersed in the facts of this case since 1970 and who had a thorough knowledge of the School District, the Fifth Circuit—omitting any mention of the extensive secondary school desegregation —labeled the plan adopted by the District Court as a plan establishing "a unitary grade" rather than a unitary system. The Fifth Circuit decided that something similar to the approach presented by the Intervenors, the only other effort made to present a plan of any type, should have been imposed. The concept (even the author admits that it is a concept and not a plan) was submitted by Dr.

John Finger and was developed in a period of less than four days. The Intervenors' expert, sitting in New York, apparently without having been to Austin, took a map of the Austin school system and statistical information concerning the enrollment and racial percentages of pupils and developed a concept for achieving greater integration. The concept called for a radical alteration of the entire educational structure, transfer of school assignments for most students, and massive busing of a substantial portion of Austin students, including the transportation of all kindergarten through fourth grade minority students living on the east side of the School District across town to the west side of the District. The problems of transportation, age, health, and educational process were dealt with by simply ignoring them. This approach is a good example of the fact that anyone can develop a theoretical concept for desegregating a school system so long as he does not concern himself with the practical factors with which a school district must deal. Indeed, since 1970, the School District, the Justice Department, the Department of Health, Education and Welfare, the Intervenors, and various groups of parents, citizens, and other interested parties have been attempting to develop a plan which would provide additional desegregation for the Austin school system. The problem is that when the time comes to develop a workable plan, only the School District has been able to develop a plan that is workable and practicable.

In contrast to Dr. Finger, the District Court weighed the many factors bearing on the balancing process and adopted a plan achieving the greatest possible degree of actual desegregation the circumstances would permit. Taking in-

to account the many educational, safety, and familial interests, the District Court held that further integration of elementary children in grades kindergarten through five was impossible without serious risks to education and health. The record before the Court clearly suports this holding. What the Fifth Circuit characterizes as a "vague, conclusory and unsupported assertion" is supported by in excess of 100 pages of transcript in the 1973 record and extensive evidence in the 1971 hearings.

The conflict between the Fifth Circuit's holding and the directives established by this Court is evident. The Fifth Circuit in effect views the federal courts' remedial powers as having no limits. No circumstances can justify anything short of full racial and ethnic mixing. This Court, to the contrary, recognizes that there must be limits. The Fifth Circuit's position is that it is enough to minimize these problems and no limitation is appropriate:

> We therefore direct the District Court, in completing the desegregation plan for Austin, to *minimize* the economic cost of busing, the traffic congestion that the busing plan will cause, the time that school children must spend on the buses, and the number of students who will leave the public school system rather than participate in the desegregation plan. [emphasis added]

App. 34.

Obviously these problems would be minimized in devising any plan, desegregation or otherwise. However, there is a difference between "limit" and "minimize." To say, as the Fifth Circuit is apparently saying, that in accomplishing the objective of desegregation, education, health and safety aspects may be ignored in the end, is to set a standard that will lead to the disintegration of the educational system for both majority and minority students. Recent history of school districts undergoing desegregation accomplished by massive transportation plans makes this clear. Almost universally, the parents who are financially able either move from the district or place their children in private schools to avoid the substantial transportation involved. This causes, as it did for example in Atlanta, districts and individual schools to lose students and become increasingly minority. *See, Calhoun v. Cook*, 522 F.2d 717 (5th Cir. 1975).

The issue here is not the rhetoric of "forced busing." Nor is the issue the refusal of the majority to recognize the rights of the minority. The issue is simply will a desegregation plan work—will the plan provide education to all students so that the past vestiges of discrimination will be truly remedied. The assignment and transportation of students to schools far removed from their neighborhood is a harsh remedy created to overcome vestiges of past discrimination. Therefore, the effectiveness of the remedy must be carefully weighed to determine whether the remedy will actually provide the overall educational result desired. If the remedy causes such a burden on the educational process that students, who can do so, leave the public school system, the remedy is obviously a failure. If, considering the age of the children and risks to health, the remedy actually interferes with the educational process of all children, the remedy is a failure. The inevitable result has been and will continue to be resegregation. No real remedy is provided by measures which disregard the educational function.

The Fifth Circuit's decision also conflicts with this Court's decision in *Pasadena*. A portion of the Finger plan, seemingly approved by the Fifth Circuit, provided

that "when changing demographic patterns cause any of the schools [schools that are naturally desegregated at the time of the hearing or implementation of the plan] to fall outside of the 'naturally desegregated' range, the schools would be brought within the Finger Plan [revised grade combination] system." It is readily apparent that this Court in *Pasadena* disapproved of such a provision, as it had previously in *Swann*. As this Court said in "[h]aving done that [established a racially neutral system of student assignment] we think that in enforcing its order so as to require annual readjustment of attendance zones so that there would not be a majority of any minority in any Pasadena public school, the District Court exceeded its authority." 44 U.S.L.W. 5117 (June 28, 1976). Moreover, this Court reaffirmed its directives in *Swann* concerning limits by stating that in "*Swann*, the Court cautioned that 'it must be recognized that there are limits' beyond which a court may not go in seeking to dismantle a dual school system." 44 U.S.L.W. 5117 (June 28, 1976).

The Fifth Circuit's opinion also conflicts with the Congressional expression of national policy established in the Equal Educational Opportunity Act of 1974, 20 U.S.C. §1701 *et seq*. In §1701, Congress declared it to be the policy of the United States that the neighborhood is the appropriate basis for determining school assignments. In §1702, Congress made a determination that "transportation of students which create serious risks to their health and safety, disrupts the educational process carried out with respect to said students, and impinges significantly on their educational opportunity, is excessive; [and] the risks and harms created by excessive transportation are particularly great for children enrolled

in the first six grades." 20 U.S.C. §1702(a)(4) and (5). Thus, Congress, in 1974, made a specific finding concerning the national policy of the United States which precisely coincided with the evidence presented to and the finding of the District Court. The Fifth Circuit dismissed the finding and evidence as a "vague, conclusory and unsupported assertion . . . ." App. 24. Such a clear statement of national policy must be taken into account by appellate courts when considering what is basically a fact question: whether the District Judge or school authorities has made every effort to achieve the greatest possible degree of actual desegregation. Surely, the Congressional finding, particularly as to the risks and harms created by transportation of children in the first six grades, cannot be simply ignored as the Fifth Circuit has done. Apparently, it has no more regard for Congressional determinations than it has for those made by this Court.

CONCLUSION

This case presents both the issue of the constitutionality of neighborhood schools and the issue of permissible scope of the remedy with unusual clarity. Both of these issues are of national importance and should be settled by this Court.

PRAYER

Petitioner prays that a Writ of Certiorari be granted to review the Judgment and Opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William H. Bingham, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Petition for Certiorari on Counsel for Respondents by despositing same in the United States Mail on August _____, 1976, addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530, Joe Rich, Department of Justice, Civil Rights Division 550 11th Street, N.W., Washington D.C. 20530, Sam Bisco, 1704 Manor Road, Austin, Texas, Gabriel Gutierrez, 1010 E. 7th Street, Austin, Texas 78701.

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